

ORDINANCE 2198

AN ORDINANCE OF THE TOWN OF LOS GATOS ADDING ARTICLE XII (MEDICAL MARIJUANA DISPENSARIES) TO CHAPTER 14 (LICENSES AND MISCELLANEOUS BUSINESS REGULATIONS) OF THE CODE OF THE TOWN OF LOS GATOS TO PROHIBIT THE ESTABLISHMENT OR OPERATION OF MEDICAL MARIJUANA DISPENSARIES

WHEREAS, the possession, cultivation, possession for sale, transportation, distribution, furnishing, and giving away of marijuana is generally unlawful under California state statutory law. (California Health and Safety Code Sections 11357-11360.)

WHEREAS, in November of 1996 the voters of the State of California approved Proposition 215 (codified as Health and Safety Code Section 11362.5 et seq. and entitled the “Compassionate Use Act of 1996”), which allows a person to use marijuana for medical purposes with a doctor’s recommendation, without violating state criminal law regarding the use, possession, or cultivation of marijuana.

WHEREAS, in 2003, the State Legislature adopted Senate Bill 420 (codified as Health and Safety Code Section 11362.7 et seq. and entitled the “Medical Marijuana Program Act”), which clarified the scope of the Compassionate Use Act and allowed cities and other governing bodies to adopt and enforce rules and regulations related to medical marijuana.

WHEREAS, federal law (codified as 21 USC Section 801 et seq. and entitled the “Controlled Substances Act”) makes it unlawful to manufacture, distribute, or possess any controlled substances, including marijuana. This creates a significant law enforcement dilemma, in that federal law now conflicts with California law.

WHEREAS, in May 2001 the United States Supreme Court issued its decision in *United States v. Oakland Buyers Cooperative and Jeffrey Jones* determining that distribution of medical marijuana is illegal under the Federal Controlled Substances Act (21 USC 841) and, there is no medical necessity defense allowed under federal law.

WHEREAS, on June 6, 2005 the United States Supreme Court issued its ruling in *Gonzales v. Raich* which decided that Congress, under the Commerce Clause of the United States Constitution, has the authority and under the Federal Controlled Substances Act has the power to prohibit cultivation and the use of marijuana even though it may be in compliance with California law. California state law (Proposition 215) is in conflict with federal law which makes it illegal to cultivate, possess, or consume marijuana, even for medical necessity.

WHEREAS, state law has created a limited affirmative defense to criminal prosecution for qualifying individuals that collectively gather to cultivate medical marijuana, as well as for

persons that qualify as a “patient,” or a “primary caregiver,” as those terms are defined within the statutory scheme. (Health and Safety Code Sections 11362.765 and 11362.775.) There is no provision that authorizes or protects the establishment of a medical marijuana dispensary, mobile or fixed location, or other storefront distribution operation.

WHEREAS, some individuals have utilized the above-referenced state law provisions as a basis for operating dispensaries that sell or otherwise provide medical marijuana. Presently, no such establishments are operating in the Town; however, without restrictions in place, a medical marijuana dispensary could attempt to open and operate without restrictions.

WHEREAS, the Town’s Community Development Department and Business License staff have received inquiries from prospective medical marijuana dispensary operators expressing interest in opening a medical marijuana dispensary.

WHEREAS, the Town of Los Gatos’ Town Code does not specifically address the regulation or location of medical marijuana dispensaries but, medical marijuana dispensaries are not a permitted use or conditionally permitted use in any zoning district.

WHEREAS, in California cities that have permitted the establishment of medical marijuana dispensaries, issues and concerns have arisen related to the establishment of medical marijuana dispensaries in close proximity to residential properties, schools, and daycare facilities. Furthermore, those cities have reported adverse impacts on public health, safety, and welfare, including an increase in crimes such as loitering, illegal drug activity, burglaries, robberies and other criminal activity within and around dispensaries, as well as increased pedestrian and vehicular traffic, noise and parking violations. Medical marijuana dispensaries have also resulted in increased demands for police response, as well as maintenance of public streets and sidewalks.

WHEREAS, there are several open state law questions regarding the regulation of medical marijuana dispensaries.

WHEREAS, in view of the current conflicts between state and federal law and reported secondary effects in jurisdictions that have medical marijuana dispensaries, it would be inconsistent and contrary to the public health, safety and welfare to permit the establishment of medical marijuana dispensaries as defined herein with the Town of Los Gatos.

THE TOWN COUNCIL OF THE TOWN OF LOS GATOS DOES ORDAIN AS FOLLOWS:

SECTION I.

A new Article XII, Medical Marijuana Dispensaries, is hereby added to Chapter 14

(Licenses and Miscellaneous Business Regulations) of the Code of the Town of Los Gatos to prohibit the establishment and operation of medical marijuana dispensaries within the Town of Los Gatos, as fully set forth on Exhibit A.

SECTION II ENVIRONMENTAL ANALYSIS

With respect to compliance with the California Environmental Quality Act (“CEQA”), the Town Council finds as follows:

- A. This ordinance is not subject to review under CEQA pursuant to sections 15060(c) (2) and 15060(c) (3) (the activity is not a “project” within the meaning of Section 15378 of the State CEQA Guidelines), because it has no potential for resulting in physical change in the environment, directly or ultimately. This ordinance does not, in itself, allow the operation of medical marijuana dispensaries; therefore there is no potential for resulting in physical change in the environment, directly or ultimately.
- A. This ordinance is covered by the general rule that CEQA applies only to projects that have the potential for causing a significant effect on the environment. For the reasons set forth in subparagraph (A) and this paragraph, it can be seen with certainty that there is no possibility that this ordinance will have a significant effect on the environment and, therefore, the ordinance is not subject to CEQA.

SECTION III SEVERABILITY

If any section, subsection, phrase, or clause of this ordinance is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this ordinance. The Town Council hereby declares that it would have passed this ordinance and each section, subsection, phrase or clause thereof irrespective of the fact that any one or more sections, subsections, phrases, or clauses be declared unconstitutional. In the event that any part of this ordinance is held to be invalid, the invalid part or parts shall be severed from the remaining portions which shall remain in full force and effect.

SECTION IV PUBLICATION

This ordinance shall be published in accordance with the provisions of Government Code Section 36933.

SECTION VI

This ordinance was introduced at a regular meeting of the Town Council of the Town of Los Gatos on July 25, 2011 and adopted by the following vote as an ordinance of the Town of Los Gatos at a regular meeting of the Town Council of the Town of Los Gatos on August 15, 2011. This ordinance takes effect 30 days after it is adopted.

COUNCIL MEMBERS:

AYES: Steven Leonardis, Diane McNutt, Steve Rice, Barbara Spector and Mayor Joe Pirzynski

NAYS:

ABSENT:

ABSTAIN:

SIGNED:

/s/Joe Pirzynski

**MAYOR OF THE TOWN OF LOS GATOS
LOS GATOS, CALIFORNIA**

ATTEST:

/s/Mazarin Vakharia

**CLERK ADMINISTRATOR OF THE TOWN OF LOS GATOS
LOS GATOS, CALIFORNIA**

EXHIBIT A

CHAPTER 14

ARTICLE XII. MEDICAL MARIJUANA DISPENSARIES

Sec. 14.120.010 – Purpose, findings and intent.

Sec. 14.120.015 - Definitions.

Sec. 14.120.020 - Prohibition of medical marijuana dispensaries.

Sec. 14.120.010 – Purpose, findings and intent.

A. In enacting this article, the town council finds as follows:

1. In 1970, Congress enacted the Controlled Substances Act (CSA) which, among other things, makes it illegal to import, manufacture, distribute, possess or use marijuana in the United States.
2. In 1996, the voters of the State of California approved Proposition 215 [the Compassionate Use "Act" (codified as Health and Safety (H&S) Code Section 11362.5 et seq.)].
3. The Act creates a limited exception from criminal liability for seriously ill persons who are in need of medical marijuana for specified medical purposes and who obtain and use medical marijuana under limited, specified circumstances.
4. On January 1, 2004, the "Medical Marijuana Program" (MMP), codified as H&S Code Sections 11362.7 to 11362.83, was enacted by the state Legislature to clarify the scope of the Act and to allow cities and other governing bodies to adopt and enforce rules and regulations consistent with the MMP.
5. The Act expressly anticipates the enactment of additional local legislation. It provides: "Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others or to condone the diversion of marijuana for nonmedical purposes." (H&S Code Section 11362.5.)
6. The town council takes legislative notice of the fact that several California cities and counties which have permitted the establishment of medical marijuana dispensaries have experienced serious adverse impacts associated with and resulting from such dispensaries. According to these communities, according to news stories widely reported and according to medical marijuana advocates, medical marijuana dispensaries have resulted in and/or caused an increase in crime, including burglaries, robberies, violence, illegal sales of marijuana to, and use of marijuana by, minors and other persons without medical need in the areas immediately surrounding such medical marijuana dispensaries. The town council reasonably anticipates that the

- Town of Los Gatos will experience similar adverse impacts and effects. A California Police Chiefs Association compilation of police reports, news stories and statistical research regarding such secondary impacts is contained in a copyrighted 2009 white paper report entitled White Paper of Medical Marijuana Dispensaries by California Police Chiefs Association Task Force.
7. The town council further takes legislative notice that as of June 2011, according to at least one compilation, 103 cities and 15 counties have adopted moratoria or interim ordinances prohibiting medical marijuana dispensaries. The town council further takes legislative notice that 143 cities and 12 counties have adopted prohibitions against medical marijuana dispensaries.
 8. The town council further takes legislative notice that the California Attorney General has adopted guidelines for the interpretation and implementation of the state's medical marijuana laws, entitled "GUIDELINES FOR THE SECURITY AND NON-DIVERSION OF MARIJUANA GROWN FOR MEDICAL USE (August 2008)." (http://ag.ca.gov/cms_attachments/press/pdfs/n1601_medicalmarijuanaguidelines.pdf.) The Attorney General has stated in the guidelines that "[a]lthough medical marijuana 'dispensaries' have been operating in California for years, dispensaries, as such, are not recognized under the law."
 9. The town council further takes legislative notice that concerns about nonmedical marijuana use arising in connection with Proposition 215 and the MMP also have been recognized by state and federal courts. (See, e.g., *Bearman v. California Medical Bd.* (2009) 176 Cal.App.4th 1588; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1386 to 1387; *Gonzales v. Raich* (2005) 545 U.S. 1.)
 10. The town council further takes legislative notice that the use, possession, distribution and sale of marijuana remain illegal under the CSA (*Bearman v. California Medical Bd.* (2009) 176 Cal.App.4th 1588); that the federal courts have recognized that despite California's Act and MMP, marijuana is deemed to have no accepted medical use (*Gonzales v. Raich*, 545 U.S. 1; *United States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483); that medical necessity has been ruled not to be a defense to prosecution under the CSA (*United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483); and that the federal government properly may enforce the CSA despite the Act and MMP (*Gonzales v. Raich*, 545 U.S. 1).
 11. The town council further takes legislative notice that the United States Attorney General announced in 2008 its intention to maintain enforcement of federal laws as applied to medical marijuana dispensaries which otherwise comply with state law. There is no certainty how long this uncodified policy will remain in effect, and the underlying conflict between federal and state statutes still remains.
 12. The United States Department of Justice issued a memorandum dated June 29, 2011 that outlined the Department's intent to enforce the Controlled Substances Act (CSA) in jurisdictions considering legislation that would sanction and regulate commercial cultivation and distribution of marijuana for purportedly medical use.

13. An ordinance prohibiting medical marijuana dispensaries, and prohibiting the issuance of any permits, licenses and entitlements for medical marijuana dispensaries, is necessary and appropriate to maintain and protect the public health, safety and welfare of the citizens of Los Gatos.

B. The purpose of this article is to prohibit the establishment, operation, and location (fixed or mobile) of medical marijuana dispensaries in the Town of Los Gatos.

Sec. 14.120.015 – Definitions and exceptions.

A. For the purposes of this article, “marijuana” shall have the same meaning as set forth in California Health and Safety Code Section 11018 as of the effective date of this article and as subsequently amended. Currently under Section 11018, “marijuana” means all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil or cake, or the sterilized seed of the plant which is incapable of germination. “Marijuana” shall also include concentrated cannabis, the separated resin, whether crude or purified, obtained from marijuana, and any foodstuffs infused with marijuana or concentrated cannabis.

B. For the purposes of this article, "medical marijuana dispensary" means any facility or location, whether fixed or mobile, where medical marijuana is provided, sold, made available or otherwise distributed to one or more of the following: a primary caregiver, a qualified patient or a person with an identification card.

C. For the purposes of this article, the terms "primary caregiver," "qualified patient" and "person with an identification card" shall be as defined in California Health and Safety Code Section 11362.7.

D. For purposes of this article, a "medical marijuana dispensary" shall not include the following uses, provided that the location of such uses are otherwise regulated by applicable law, and further provided any such use complies strictly with applicable law, including, but not limited to, California Health and Safety Code Section 11362.5 et seq. and California Health and Safety Code Section 11362.7 et seq.:

1. A clinic licensed pursuant to Chapter 1 of Division 2 of the California Health and Safety Code.
A health-care facility licensed pursuant to Chapter 2 of Division 2 of the Health and Safety Code.
3. A residential care facility for persons with chronic life-threatening illness licensed pursuant to Chapter 3.01 of Division 2 of the Health and Safety Code.

4. A residential care facility for the elderly, licensed pursuant to Chapter 3.2 of Division 2 of the Health and Safety Code.
5. A residential hospice, or a home health agency, licensed pursuant to Chapter 8 of Division 2 of the Health and Safety Code.

Sec. 14.120.020 - Prohibition of medical marijuana dispensaries.

A. Medical marijuana dispensaries are prohibited in the Town of Los Gatos. No medical marijuana dispensary, fixed or mobile, shall establish, locate, operate, or otherwise be permitted within the Town of Los Gatos.

B. The town shall not issue, approve or grant any permit, license or other entitlement for the establishment or operation of a medical marijuana dispensary.